90-1863

No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

WALKER L. CHANDLER and CAROLE ANN RAND,
Petitioners,
vs.
GEORGIA PUBLIC TELECOMMUNICATIONS
COMMISSION, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Opinion of the Eleventh Circuit Court of Appeals, dated October 31, 1990 . . . . . A-1

Order of the United States District Court for the Northern District of Georgia, dated October 18, 1990 . . . . . A-37

Denial of Petition for Rehearing, dated March 1, 1991 . . . A-61

Judgment of Eleventh Circuit Court of Appeals A-64

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-8968

D.C. Docket No. 1:90-cv-2040-MHS

WALKER CHANDLER,
Plaintiff-Appellee,
CAROLE ANN RAND,
Intervenor-Plaintiff,
Appellee,

versus

GEORGIA PUBLIC TELECOMMUNICATIONS COMMISSION, et al.,
Defendants-Appellants,
ATLANTA JOURNAL AND ATLANTA CONSTITUTION,
Intervenors-Defendants,
Appellants.

Appeal from the United States District Court for the Northern District of Georgia

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(October 31, 1990)

Before CLARK, Circuit Judge, HILL* and COFFIN**, Senior Circuit Judges.

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*See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

**Honorable Frank M. Coffin, Senior U.S. Court of Appeals for the First Circuit, sitting by designation.

PER CURIAM:

On September 17, 1990, appellee Walker Chandler ("Chandler") filed suit in federal district court against the Georgia Public Telecommunications Commission ("GPTC"), an instrumentality of the State of Georgia. Chandler, theLibertarian candidate for lieutenant governor of Georgia, sought to enjoin GPTC from broadcasting a political debate on November 2, 1990, between the Democratic and Republican candidates for lieutenant governor unless he were included as a debating participant. Carole Ann Rand ("Rand"), the Libertarian candidate for governor, intervened as plaintiff and sought a similar injunction against the broadcast of a similar debate on November 4, 1990, between the Democratic and Republican

candidates for governor.1 After the plaintiffs had amended their complaint to add the members of GPTC in their individual and official capacities, the district court on October 18, 1990, issued a temporary restraining order. Basing its decision on First Amendment and Equal Protection grounds, the district court enjoined the defendants from televising either debate unless they included the Libertarian candidates. This expedited appeal followed.2 Briefs were filed on a time-shortened schedule, and we heard oral argument in Atlanta on October 30. We VACATE the district court's order permanently and REMAND with instructions to dismiss the complaint.

In view of the fact that the parties are in need of a prompt resolution of the issues, we delay the

issuance of our judgment only long enough for the following succinct opinion.

I. FIRST AMENDMENT

This court has held that the degree of control that a public broadcast licensee can exercise over its broadcast programming consistent with the First Amendment depends on the mission of the communicative activity being controlled. Schneider v. Indian River Community College Fund, Inc., 875 F.2d 1537, 1541 (11th Cir. 1989). Where the activity does not function as a pure marketplace of ideas, the state is permitted to regulate content in order to prevent hampering the primary function of the activity. Id. (citing Muir, 688 F.2d at 1050). Were GPTC a medium open to all who have a message, whatever its nature, GPTC would function as a marketplace of

ideas. See Muir, 688 F.2d at 1052 (Rubin, J. concurring). GPTC, however, is not such a medium. GPTC is "created, designed, and intended for the purpose of providing educational, instructional, and public broadcasting services to the citizens of the State of Georgia." O.C.G.A. section 20-13-5(a) (Supp. 1990). Further, as a public television station, GPTC is under an obligation to serve the public interest. Schneider, 875 F.2d at 1541. As testimony indicated, GPTC's employees make editorial decisions on a daily basis determining which programs to air in order to meet the needs and interest of Georgia's citizens. obviously a decision to broadcast on e program excludes, for that time, all other programs.4 Members of the public are not provided free access to GPTC air time.

It is clear that GPTC "regulated content" by making a decision to air

debates between candidates of the major parties. Contrary to the district judge's order, however, this content-based decision is not viewpoint restrictive and does not violate the First Amendment. As noted above, GPTC makes content-based decisions on a regular basis in order to serve Georgians. A decision to air any show is necessarily content-based. GPTC chose to air a debate between only the Democratic and Republican candidates because it believed such a debate would be of the most interest and benefit to the citizens of Georgia. Such a decision promoted GPTC's function, was "reasonable" and was "not an effort to suppress expression merely because public officials oppose the speaker's views." Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800 (1985).

Finding no policy or practice of GPTC that "pervasively 'curtail[s] access to ideas,' lending a constitutionally impermissible, discriminatory bias to the station's mission," Schneider, 875 F.2d at 1541, we conclude that the district court erred in basing its order on First Amendment grounds.5

II. EQUAL PROTECTION

The district court concluded that, for many of the same reasons that appellants' actions violated the First Amendment, a violation of the Equal Protection Clause of the Fourteenth Amendment also existed. Appellees are not members of a protected class, and thus appellants need only exhibit a rational basis for their decisions. See Eide v. Sarasota County, 908 F.2d 716, 722 (11th Cir. 1990). As we determined above, appellants' decisions

were rational, and we thus find no Equal Protection violation.6

III. CONCLUSION

Our view does not mandate, authorize or predict Orwellian state thought control through selective airing of viewpoints on public television stations. Without deciding, we can safely predict that the use of state instrumentalities to suppress unwanted expressions in the marketplace of ideas would authorize judicial intervention to vindicate the First Amendment. Short of that, public television stations must, no matter what may be the wishes of state government personalities, abide by the dictates of 47 U.S.C. section 315 regarding fairness and balance or lose their licenses.

The dissent is facially appealing insofar as it deplores the failure of the appellants to invite just one more

participant to each program. Whether that is good policy is, we believe, for the program decisions of the station. Were we to hold that such an invitation is required by the Constitution, we could see no principled basis upon which that rule could be limited to the candidate who has obtained a ballot position and not extended to all other serious candidates. A decision to air the debate between the two front runners, or the three who will appear on the ballot, or others, is appropriately made by the programmers undertaking to provide an educational program of sufficient interest to attract viewers. The mixture of ideas, protected by the First Amendment, is just as protected when offered by a write-in candidate as by one on the ballot by petition, by primary election, or by party convention. We are not

willing to establish a precedent that would require public television stations to forego the broadcast of controversial views touching upon important public issues -- environment, ecology, animal rights, ozone depletion -- lest the airing of such programs require the inclusion of a cacophony of differing views on each subject. The values sought to be fostered by the First Amendment would be frustrated, not furthered, by the fitting of such harnesses on public television.

We review the district court's grant of preliminary injunctive relief for abuse of discretion. United States v. Jefferson County, 720 F.2d 1511, 1519 (11th Cir. 1983). For the foregoing reasons, we conclude that the district judge did abuse his discretion in finding a substantial likelihood of success on the merits. Because appellees

do not meet the first part of the test for a preliminary injunction, we need not address the other elements of the test. Id.

We thus VACATE the district court's order permanently and REMAND with instructions to dismiss the complaint.

CLARK, Circuit Judge, dissenting:

This First Amendment case concerns the use of Georgia's publicly-owned television network to broadcast a public debate between two of the three candidates for the position of governor, and between two of the the three candidates for the position of lieutenant-governor. I applaud the decision to use the network for the debates; I deplore the state's exclusion of the duly qualified candidates of the Libertarian Party. Under the facts of this case, the First Amendment forbids the state from selectively choosing

which qualified candidates can and cannot debate and further forbids the state from denying its citizens the opportunity of simultaneously viewing the candidates whose names will face them on the ballot. The uncensored right to speak and to hear go to the heart of governance in this democracy. Political debate should have the highest rank on the First Amendment's scale of liberties. Thus, I respectfully dissent.

I. BACKGROUND

As noted by the majority, the Georgia Public Telecommunications Commission (GPTC)1 is an agency of the state of Georgia established by statute. GPTC is composed of nine members, six of whom are members of the general public appointed by the governor. GPTC also includes one elected official, the state school superintendent, as well as the

chancellor of the university system and the commissioner of technical and adult education. O.C.G.A. section 20-13-2 (Supp. 1990).

Besides the Republican and Democratic candidates, appellees are the only other ballot-qualified candidates in the races for governor and lieutenant-governor. They have qualified to appear on the general election ballot under O.C.G.A. section 21-2-180 by being nominated by a party that in the last statewide election received votes equal to at least on percent of the number of registered voters in the state of Georgia.2

Appellees asked to be included in the two debates. GPTC refused to include them and offered the Libertarians one-half hour of television time each to state their views. Appellees then filed suit seeking an

injunction against the sponsors of the debates from excluding them. The district court concluded that a temporary restraining order should issue to prevent the broadcast of the debates from taking place without the participation of the Libertarian candidates. The district court held that "defendants have filed to even articulate a reasonable basis for excluding ballot-qualified Libertarian candidates from a nonpublic forum." Order of Oct. 18, 1990, at 8. The court rejected appellants' argument that the Libertarians could be excluded on the basis that their views were less newsworthy than that of the major party candidates, holding that his was impermissible viewpoint-based discrimination. Id. at 10-11. The district court also found that appellees' Fourteenth Amendment equal

protection rights had been violated. Id. at 13-14.

II. DISCUSSION

The question involved here is essentially whether an arm of the state can organize and broadcast a debate between candidates for office, including some and excluding others. To my mind, the jurisprudence of the First Amendment surrounding the exclusion of speakers from government-created but nonpublic forums provides the answer.

The Supreme Court has established a typology of forums -- state-created places of information-exchange -- for purposes of First Amendment analysis. If a traditional forum (the public green, for example) is involved, the government must have a compelling state interest to justify any restrictions, which must be narrowly tailored. This rationale also applies to created

forums, that is, government-designated places of communication "for use by the public at large for assemble and speech, for use by certain speakers, or for the discussion of certain subjects." Cornelius v. NAACP Legal Defense & Education Fund, 105 S.Ct. 3439, 3449 (1985). By contrast, where a nonpublic forum has been created -- as in the case of teachers' school mailboxes, Perry Education Ass'n v. Perry Local Education Ass'n, 103 S.Ct. 948, 955 (1983) -- the government may impose content-based restrictions that are both "reasonable" and "not an effort to suppress expression merely because public officials oppose the speaker's view." Cornelius, 105 S.Ct. at 3448.

In this case, candidates' ideas will be exchanged on the issue of state governance and will then be telecast to voters throughout Georgia. There is,

however, no evidence here of governmental intent to "designate a place not traditionally open assemble and debate as a public forum," Cornelius, 105 S.Ct. at 3449, as in no sense has the general public has been invited to appear to GPTC's network and express its opinions on the election. It seems that, at a minimum, the government of Georgia has created a nonpublic forum.

However, by discriminating against the viewpoints expressed by the Libertarians, GPTC has violated even the minimal First Amendment standards applicable to nonpublic forums. Cornelius holds:

> Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions are reasonable in light of the purpose served by the forum and areviewpoint neutral. Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed

> within the purpose of the forum, or if he is not a member of the class of speakers for whose especial benefit the forum was created, the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includable subject.

105 S.Ct. at 3451 (citations omitted).

The district court was correct to find that the exclusion of the Libertarians was not "reasonable in light of the purpose served by the forum." Id. The purpose of the debates is presumably to expose the voters of Georgia to the opinions and policies of the candidates for public office. Such a goal would be consistent with the educational goals of Georgia's public broadcasting network. Excluding certain qualified candidates is not a reasonable method of achieving the debates' informational goals. Moreover, the district court's finding that GPTC's decision to exclude the Libertarians was

not "viewpoint neutral," id., is amply supported by the record. The transcript of the evidentiary hearing held by the district court is replete with statements by Dr. Ottinger, the director of GPTC, that GPTC decided that the viewpoint of the Libertarians was less valuable than those of the Democrats and Republicans: "The premise for the program that we designed was that the majority of the people would be most interested in the viewpoints of these two candidates, and that's why we want to put them head to head." Transcript, Oct. 18, 1990, at 20. "The point of views on the positions taken by the Democratic or Republican candidates would be of greater interest to the public than would by the Libertarian candidate in terms of the public making decisions who they would vote for." Id. at 22-23. "I think ... that the value

of the program was that only these two sets of views would be expressed, one contrasted with the other, because, again, they are the frontrunners for which the majority of the people, in all likelihood, will vote." Question by the court: "You think the viewpoint expressed by the Libertarian candidates would somewhat detract from that?" A: "Yes, Sir." Id. at 33.

Although it may be justifiable for private broadcasting networks to broadcast debates that exclude qualified candidates, see, e.g., Johnson v. FCC, 829 F.2d 157 (D.C. Cir. 1987)(commercial networks may broadcast a debate between major party presidential candidates and exclude third parties' candidates, even those on the ballot in a number of states),4 the purposes behind public broadcasting are significantly different from those behind commercial,

competitive television. Public broadcasting is premised on the belief that the free market will not provide all of the programming and information necessary for an educated public. Thus, many programs that would fail miserably to pay their own way on the private networks appear on public television. The political debates at issue appear to be a case in point. In the context of noncompetitive programming, the government's stated rationale for excluding the Libertarians -- that their views are less newsworthy than those of other candidates -- seems especially weak and not a little ironic.

This case is akin to situations where the government has acted to prevent expression simply because officials do not agree with the message conveyed. For example, in Brooks v. Auburn Univ., 412 F.2d 1171 (5th Cir.

1969), this court held that the First Amendment was violated when the president of Auburn University rescinded an invitation to the Reverend William Sloane Coffin to speak on campus. The opinion stated that "the right of the faculty and students to hear a speaker ... cannot be left to the discretion of the university president on a pick and choose basis." Id. at 1172; see also Board of Education v. Pico, 102 S.Ct. 2899, 2814 (1982)(Blackmun, J., concurring)("[O]ur precedents command the conclusion that the State may not act to deny access to an idea simply because state officials disapprove of the idea for partisan or political reasons." (footnote omitted)). There is little as important as an informed electorate. The electorate is the ultimate check on governmental abuse of power. To allow political appointees

such as those that comprise the GPTC boards to "pick and choose" the information the public receives from the interplay of candidates speaking unrehearsed short-circuits the controls built into our government system.

GPTC cannot persuasively maintain that, merely because candidates do not belong to one of the two major national parties, their electoral bids are never successful with the Georgia electorate. As recently as 1968, George C. Wallace carried Georgia in the presidential election, garnering 42.9% of the vote. Statistical Abstract of the United States, 1976, Table 729, at 455 n.5 (Bureau of the Census, 1976). Would GPTC have excluded George Wallace from debates it had organized between Richard Nixon and Hubert Humphrey because it perceived that Wallace was unlikely to win the presidency, having a largely

regional appeal? Unquestionably, nomination by a major party bestows a greater likelihood of election than nomination by a less well-known party. and the Libertarian candidates may very well be quite far behind in the polls.5 But a judgment that their views are not newsworthy, especially given the station's willingness to provide one-half hour each to the Libertarian candidates apart from the debates, indicates that GPTC's decision to exclude them "is in reality a facade for viewpoint-based discrimination." Cornelius, 105 S.Ct. at 3454; see also Searcey v. Harris, 888 F.2d 1314, 1324-25 (11th Cir. 1989)(exclusion of anti-military activists from school career days constituted viewpoint-based discrimination).

The majority finds that a line of cases following Judge Rubin's

concurrence in the former fifth circuit case Muir v. Alabama Educational Television Comm'n, 688 F.2d 1033 (5th Cir. 1982) (en banc), is controlling and requires that courts give maximum leeway to programming decisions of public broadcasters. Judge Rubin "held that the degree of control which can be exercised consistently with the First Amendment depends on the mission of the communicative activity being controlled. Where ... the activity is not designed to function as a pure marketplace of ideas, 'the state may regulate content in order to prevent hampering the primary function of the activity.'" Schneider v. Indian River Comm' College Found., 875 F.2d 1537, 1541 (11th Cir. 1989) (quoting Muir, 688 F.2d at 1050 (Rubin, J., concurring). Muir thus stands for the proposition that public TV may decide not to broadcast a program

based on its content.

In contrast to the situation in Muir, this case concerns the First Amendment rights of the Libertarians to express their viewpoints, not the prerogative of the Georgia Public Television Network to maintain control over programming content. GPTC has already determined, to the extent it can, the content of its broadcasts of the two debates. That is to say, GPTC has already decided to give over its airwaves to political contenders for the offices of governor and lieutenant-governor of Georgia. GPTC had not and could not dictate the actual messages those contenders will convey. Appellees do not challenge GPTC's content-based decision to air debates between political candidates. Instead, they challenge GPTC's decision to exclude their particular viewpoints from the

electoral conversation.

The majority quotes Schneider, 875 F.2d at 1541, for the proposition that the Libertarians must show that GPTC has followed a policy or practice of "pervasively 'curtailing access to ideas.'" Id. (quoting Muir, 688 F.2d at 1053). However, Dr. Ottinger admitted that the audience for the Libertarians' separate half-hour would be significantly diminished from the audience for the debate. Transcript, Oct. 18, 1990, at 20. By not allowing either of the Libertarians to present their opinions with the other ballot-qualified candidates, the state of Georgia is clearly limiting the number of people who will be exposed to the Libertarians' views. Perhaps more importantly, the decision to show or not to show a particular program or documentary and the ideas contained

therein is very unlike the decision to exclude political parties from a debate. The positions put forward in a particular television program may find equally effective expression through a wide variety of media. I would not contend, therefore, that when the state shows a documentary it must include all viewpoints in that documentary. But an idea is not a candidate, and freedom of speech has a greater meaning in the election arena. There is only one way for candidates themselves to argue their positions with each other: through the medium of a debate. A debate serves to inform the public far more effectively than any candidate's lone appearance could by creating a synergism between the candidates' immediately conflicting positions. For the state to set up such a debate and exclude certain candidates not only puts its stamp of approval on

the favored candidates, it also "curtail[s] access to ideas" by preventing the ideas and information that would be produced through the debating candidates' interaction from coming to light.

The district court's decision to draw a distinction between ballot-qualified and write-in candidates for purpose of access to the debate was justified. The state of Georgia has established an objectively neutral method of qualifying for the ballot -- in this case, the Libertarians won at least 29,000 votes in the last statewide election. Write-in candidates do not have to meet the same test of public support. Given a limited amount of broadcasting time, it would seem reasonable to distinguish between these two groups of candidates. GPTC could have thereby avoided any inquiry into

the viewpoints or newsworthiness of the candidates involved; it could have thereby avoided having an agency of the state effectively endorse the major party candidates. The majority argues that the First Amendment makes no distinction between the ideas of candidates, whether write-in or major party. I agree and would add that neither should the officers of GPTC. But where lines must be drawn, the opinion of at least 29,000 voting Georgians seems a perfectly valid distinction to make. I cannot say the same for the unbridled discretion of GPTC.

This court should, in this case and all others, decide the question before it. We are not faced with a situation where there are forty-four ballot-qualified candidates running for the governor of Georgia, or even four. It

is clear that, were it difficult or impossible to conduct a debate with the number of candidates qualified for the ballot, GPTC would have a neutral and not viewpoint-based rationale for not having all of the candidates on the same debate panel at the same time. But there has been no showing that this is the case here, and there is time enough to decide questions that have not presented themselves.

The restraining order entered as to both debates, including the debate sponsored by the AJC, should be upheld because the state of Georgia is effectively endorsing the major party candidates by broadcasting a debate that excludes other candidates. The state must actively avoid even the appearance of favoritism between candidates. If nonbroadcast entities such as the AJC know that the only broadcast outlets

typically available for political debates (i.e., public television) are prohibited from televising debates that do not include all qualified candidates willing and able to appear, they will factor this knowledge into their estimates of the planning and lead time necessary to organize debates.

III. CONCLUSION

The Libertarian candidates wish to address topics that are within the parameters of the debates. They are members of the class of speakers for whom the debates were created, having qualified to appear on the general election ballot. And a decision that debates including the Libertarians based on the fact that their views are less newsworthy than those of the major party candidates is necessarily based on an estimation of the value and substance of their views. Because viewpoint

discrimination is unconstitutional in any forum, public or otherwise, the district court should have been affirmed.

1 Chandler and Rand were offered thirty minutes of air time on the GPTC stations to present their views.

2 Subsequent to the district court's order, The Atlanta Journal and The Atlanta Constitution, the party responsible for paying the cost of the stage set-up for the gubernatorial debate (GPTC is responsible for broadcast and other costs), intervened to pursue an appeal. The newspaper has no active role in the lieutenant gubernatorial debate; GPTC itself decided to initiate and broadcast that debate.

3 In Schneider, we cited Judge Rubin's concurring opinion in Muir v. Alabama Educ. Television Comm'n, 688 F.2d 1033 (5th Cir. 1982)(en banc), cert. denied, 460 U.S. 1023 (1983), a former Fifth Circuit case that is binding precedent under Stein v. Reynolds Sec., Inc., 667 F.2d 33,34 (11th Cir. 1982). Judge Rubin's concurrence is the holding of Muir because, absent a majority opinion, the narrowest concurrence is the holding of the case. Schneider, 875 F.2d at 1541.

We note that appellees contend that Schneider and Muir should not control this case. We disagree. While the facts of those case are not identical to the instant case, those cases addressed a very similar issue to the one before us: the extent of discretion a public broadcast licensee can exercise consistent with the First Amendment.

4 In a similar vein, it might be said that plaintiffs were excluded from the program. The decision to air a debate between the Democrat and Republican candidates may be said to exclude, by not including, all others, Libertarian, write-in or potentials.

5 We note that we are not alone in finding that the First Amendment does not necessarily grant political candidates the right to be included in candidate debates. See, e.g., Deyoung v. Patten, 898 F.2d 628, 632-33 (8th Cir. 1990) (finding, among other things, that minor party candidate who had not been included in a debate conducted and televised by Iowa Public Television had "no First Amendment right to appear on television, at least to any extent greater than the limited right of access granted by the equal time provision of the Federal Communications Act"), and the cases cited therein.

6 We thus need not address the debate among the parties over Equal Protection cases from other circuits.

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1 Appellees' amended complaint names the directors and officers of GPTC as defendants in their individual capacities. These defendants are: Frank Bugg, deputy director; Dr. Richard Ottinger, executive director; Bill Johnston, director of production; Frank Jones, chairman, board of directors; and boardmembers William Allison, Dr. Kenneth Breeden, Nancy Connolly, Lovick Corn, Robert James, Dr. Dean Probst, Dr. Werner Rogers, and Jackie Ward. See

Plaintiffs' First Amendment of Complaint, Oct. 18, 1990, at 1.

2 In 1988, there were 2,941,339 registered voters in Georgia. Thus, a Libertarian candidate must have received at least 29,413 votes in a statewide election held that year.

3 Ottinger further testified that it would not be difficult to expand the format one-half hour to include the Libertarians. Transcript, Oct. 18, 1990, at 24.

4 I note that the FCC has refused to prohibit non-inclusive debates broadcast over the public airwaves, regardless of the sponsor. See In re Cyril E. Sagan, 1 FCC Rcd. 10 (1986). Although I believe much deference to agency decision-making is due, the courts are the ultimate guardians of the Constitution.

5 However, Dr. Ottinger admitted that the decision to exclude the Libertarians was not based on an examination of opinion polls. Transcript, Oct. 18, 1990, at 30.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WALKER CHANDLER, :

Plaintiff, :

v. : CIVIL ACTION

GEORGIA PUBLIC TELECOMMUNICATIONS COMMISSION, et al., : 1:90-cv-2040-MHS

Defendants. :

ORDER

Presently before the Court is plaintiff's motion for a temporary restraining order. For the reasons set forth below, the Court will grant plaintiff's motion.

I. Background

Plaintiff Walker Chandler ("Chandler"), Libertarian candidate for lieutenant governor of Georgia, and intervenor Carol Ann Rand ("Rand"), Libertarian gubernatorial candidate, seek to enjoin Georgia Public Telecommunications Commission ("GPTC")

from hosting political debates which exclude them from participation. GPTC plans to hold a pre-election political debate featuring the Democratic and Republican candidates for lieutenant governor on November 2, 1990. A similar debate featuring the gubernatorial candidates for the two parties will be sponsored by the Atlanta Journal & Constitution ("AJ&C"). Both debates will be televised on Georgia Public Television ("GPTV"), GPTC's broadcasting facility, on November 4, 1990. The Libertarian candidates' previous request for inclusion in these debates was denied by GPTC; Chandler and Rand, however, were offered air-time of their own, separate from the debate. See Transcript of October 4, 1990, hearing at 5.

The Court held a hearing on plaintiff's motion on October 4, 1990.

Plaintiff appeared on his own behalf and on behalf of intervenor Rand; GPTC was represented by the State Attorney General. At the hearing, the Court granted Rand's motion to intervene, denied a motion to intervene filed by proposed Republican writ-in candidate, Mitchell Williams,1 and denied defendant's motion to dismiss for improper service. on October 17, 1990, at the direction of the Court, plaintiff filed an amended complaint which included as defendants the officers and directors of GPTC. At a final hearing on October 18, 1990, defendants presented testimony concerning GPTC's decision to exclude the Libertarian candidates from the debates.

II. Discussion

Plaintiff challenges the exclusion of Libertarian candidates as a violation of the First Amendment and the Equal

Protection Clause of the Fourteenth Amendment. Plaintiff also alleges that the exclusion of Rand from the gubernatorial debate constitutes an act of sex discrimination on the part of GPTC. Finally, plaintiff contends that GPTC's "free gift" of television time is a special favor in violation of Georgia' Code of Ethics for Members of Commissions, and amounts to commercial programming in violation of GPTC's statutory purpose. See O.C.G.A. sections 45-10-3, 20-13-1(a)(1990 and Supp. 1990). Defendant moves to dismiss the action for lack of personal and subject matter jurisdiction and failure to state a claim.

A. Eleventh Amendment Immunity

Defendant argues that the Court lacks personal jurisdiction because GPTC is protected from suit by Eleventh Amendment immunity. There is no dispute

that GPTC is an instrumentality of the state, created by statute and funded, in part, by the Georgia legislature. See O.C.G.A. section 20-13-1 to -12 (Supp. 1990). Defendant argues that it is protected from monetary and injunctive relief by Eleventh Amendment immunity which has not been waived. See Fouch v. Jekyll Island-State Park Authority, 713 F.2d 1518 (11th Cir. 1983). While a state agency is protected from suit by Eleventh Amendment immunity, a plaintiff may seek to enjoin unconstitutional state action by naming the responsible state officer is his complaint. See Ex parte Young, 209 U.S. 123 (1908), Gamble v. Florida Department of Health and Rehabilitative Services, 779 F.2d 1509, 1511 (11th Cir. 1986).

Plaintiff filed an amended complaint with the court on October 17, 1990. Plaintiff's amended complaint now

properly includes as defendants the officers and directors of GPTC.2 Accordingly, the Court will dismiss the action against GPTC on Eleventh Amendment grounds.

B. FCC's Primary Jurisdiction

Defendants insist that the Court lacks subject matter jurisdiction over this action because plaintiff's exclusive remedy is to proceed before the Federal communications Commission ("FCC"). Because the FCC typically handles claims against broadcasters, defendants argue that plaintiff should proceed against GPTC before the FCC to enforce the equal time provision of the Federal Communications Act. See 47 U.S.C. section 315.3

Plaintiff is not attacking GPTC as a broadcaster, however, nor is he seeking equal time pursuant to Section 315.4 Rather, plaintiff challenges

defendants in their capacities as state officials for alleged constitutional violations. It would be unreasonable to require plaintiff to seek redress for constitutional violations with the FCC simply because GPTC is a broadcaster and the FCC regulates some aspects of GPTC's operation. The FCC has no special expertise in handling constitutional claims of this kind, nor is there a suitable administrative remedy available. In addition, there is no question that plaintiff has not attempted to bring a private right of action under Section 315. Cf. Belluso v. Turner Communications Corp., 633 F.2d 393 (5th Cir. 1980). Therefore, the Court finds the action is properly before the Court and will deny defendant's motion to dismiss for lack of subject matter jurisdiction.

C. Special Favors, Commercial Programming, Sex Discrimination

Plaintiff alleges that GPTC's "gift" of free television time constitutes a special favor in violation of the Code of Ethics ("the Code") governing commissions. See O.C.G.A. section 45-10-3 (1990). At the October 4, 1990, hearing, the Court indicated that GPTC's actions relating to the debates did not appear to constitute special favors within the meaning of the Code. See Transcript at 6. Plaintiff has submitted no evidence or argument that changes the Court's opinion on this matter. GPTC's choice of the participants in the debates was not an effort to bestow a benefit on the majority party candidates, but represented a decision concerning the popularity of the views and candidacies of the Libertarian representatives. As

discussed below, GPTC's decision to exclude the Libertarian candidates is violative of plaintiff's constitutional rights. It is not, however, a violation of the Code or grounds for a private right of action under the Code.

Equally unconvincing is plaintiff's argument that GPTC's televising of the debates amounts to commercial programming in violation of its statutory purpose. See O.C.G.A. section 20-13-8(a)(2)(Supp. 1990). There is no indication that the debates are a profitable endeavor for GPTC, nor does AJ&C's involvement render the events commercial in nature. Finally, plaintiff's contention that Rand was excluded because she is a female is inconsistent with his argument that he and Rand were excluded based on the content of their speech. The Court finds meritless plaintiff's argument

that the exclusion of Rand constituted sex discrimination.

D. First Amendment

Plaintiff alleges that defendants' refusal to allow Libertarian participation in the upcoming debates is violative of the First Amendment rights of freedom of speech and access. Defendants argue there is no First Amendment right of access to the broadcast media and, therefore, plaintiff's action should be dismissed for failure to state a claim. Defendants insist that GPTC is not a public forum for First Amendment purposes.

The type of restrictions which may be placed on First Amendment activities depends in large part on "the nature of the relevant forum." Cornelius v. NAACP Legal Defense Fund, 473 U.S. 788, 800 (1985). In a traditional public forum

and a 'created" public forum, speakers can be excluded only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest. Id.; Perry Education Association v. Perry Local Educators' Association, 460 U.S. 43,45 (1983). The government is afforded considerably more latitude in a nonpublic forum: "Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." Cornelius, 473 U.S. at 806. In other words, the government may not deny access to a speaker "solely to suppress the point of view he espouses on an otherwise includable subject." Id. Unlike in most First Amendment

cases, the Court in this instance need no determine the nature of the forum at issue because defendants have failed to even articulate a reasonable basis for excluding ballot-qualified Libertarian candidates from a nonpublic forum.

The stated reason for the exclusion of plaintiff and intervenor from the debates by GPTC is that:

> "Were its air waves open for unrestricted access to all citizens, the GPTC would be unable to operate within the guidelines set by Congress through enactment of the Federal Communications Act ... . GPTC clearly has as its legitimate purpose the dissemination of newsworthy information in a format it judges to be responsive to the demands of the public. The citizens of Georgia will, in large measure, vote for either the Democratic or Republican candidates in the upcoming elections."

Defendant's Reply Brief at 5. At the October 18, 1990, hearing, Dick Ottinger ("Ottinger"), Executive Director of GPTC, stated that he and the other

officers of GPTC decided to include only the two "frontrunners" in each debate because the information presented by the majority candidates was of greater interest to the public and, therefore, more newsworthy.

Although the state's basis for its decision to restrict access to a nonpublic forum need not be the most reasonable or only reasonable basis, Cornelius, 473 U.S. at 808, "[t]he existence of reasonable grounds for limiting access to a nonpublic forum will not save a regulation that is in reality a facade for viewpoint based discrimination." Searcy v. Crim, 888 F.2d 1314, 1324 (11th Cir. 1989), citing Cornelius, 473 U.S. at 811.5 The basis articulated by defendants is not even an attempt to mask their content-based motivations.

The Libertarian platform admittedly represents a minority point of view in Georgia and is less popular than that of the traditional parties. However, to exclude a ballot-qualified candidate from debates hosted by GPTC because the candidates' views are of less interest to the public or less newsworthy6 is viewpoint based discrimination in violation of the First Amendment.7 See Kelley v. WMUL-TV, 7 Med.L.Rptr. 1094, 1095 (S.D.Va. 1980). A decision on the popularity of a particular candidate necessarily includes a judgment regarding the content of the political speech. An agency of the state cannot make a unilateral decision concerning the content of the views of a minority candidate, even in a nonpublic forum. The Court finds defendants' decision to exclude plaintiff and intervenor a

constitutionally impermissible prior restraint based upon content.

The Court is not suggesting that defendants are required to include the entire citizenry of Georgia as possible participants in the debates. Rather, plaintiff argues that as ballot-qualified candidates8 for the Libertarian party, he and intervenor should be permitted to participate in debates which include the other ballot-qualified candidates. The proposed ballots in the two races will include only the Republican candidates, the Democratic candidates, and the Libertarian candidates. Inclusion of one more ballot-qualified candidate in each of the debates will not impede GPTC's ability to operate within the Federal Communications Act. Moreover, Ottinger testified that the only problem with including a third candidate in each

debate is that it would diminish the time available for each candidate to present his or her views. However, Ottinger also stated there would be no problem with extending the one hour format by one half-hour to accomodate the additional participants.9

The Court finds that it is not reasonable to exclude these candidates from the debates in light of the circumstances and of the purpose to be served by the forum. There would be little if any disruption to the forum if plaintiff and intervenor are included in the upcoming debates. Additionally, the effectiveness of the debates, rather than the effectiveness of the individual presentations by the candidates, will not be ~~hind~~ered. See Cornelius, 473 U.S. at 811 (First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic

forum and would hinder its effectiveness for its intended purpose).

The Court's decision does not go so far as to find a right of access to the broadcast media. See DeYoung v. Patton, 898 F.2d 628 (8th Cir. 1990)(no constitutional right of access to state broadcast facility).

Rather, the Court holds that the government cannot restrict access to a public or nonpublic forum to suppress an otherwise includable viewpoint. Cornelius at 808. Plaintiff and intervenor have been excluded from the upcoming debates because defendants believe they may exercise unbridled discretion in choosing participants in a political discourse amount ballot-qualified candidates. The First Amendment protects the Libertarian candidates from such unreasonable restriction on speech.

E. Equal Protection

Plaintiff also alleges that defendants' decision to exclude them from the debates violates the Equal Protection Clause of the Fourteenth Amendment. Plaintiff and intervenor are not a protected class for equal protection purposes; therefore, the Court must examine defendants' actions under the "minimal scrutiny" standard giving deference to state objectives. However, the state must exhibit "some rationality in the nature of the class singled out." Rinaldi v. Yeager, 384 U.S. 305, 308-09 (1966).

Chandler is similarly situated with the Republican and Democratic candidates for Lieutenant Governor. Likewise, Rand is similarly situated with the Republican and Democratic gubernatorial candidates. All are "ballot-qualified," meaning, theirs are the only names that

will appear on the ballots for these two state-wide offices. The Court cannot find, and defendants have not offered, any legitimate public purpose or rational purpose for excluding the third-party candidates. Certainly the fact that the Libertarian candidates are less popular than the majority parties' candidates is not a rational basis for the exclusion. For many of the same reasons that defendants' actions violate the First Amendment, the Court finds a violation of the Equal Protection clause of the Fourteenth Amendment.

III. Conclusion

To prevail on his motion for a temporary restraining order, plaintiff must establish four factors:

a. a substantial likelihood that plaintiff will prevail on the merits;

b. a substantial threat that plaintiff will suffer irreparable injury

if the injunction is not granted;

c. that the threatened harm to plaintiff outweighs the possible harm to defendants should they be enjoined; and

d. that the grant of a injunction will not disserve the public interest. United States v. Alabama, 791 F.2d 1450, 1459 n.10 (11th Cir. 1986), cert. den. 107 S.Ct. 1287 (1987). Plaintiff and intervenor will suffer irreparable injury if they are excluded from the debates, they will lose the opportunity to participate with other ballot-qualified candidates, and the harm will greatly outweigh any harm to defendants if the injunction is issued. Also, plaintiff will quite probably succeed on the merits of his constitutional claims. Most important, the public's interest will be best served by vindicating the constitutional rights of plaintiff and intervenor.

Accordingly, the Court GRANTS plaintiff's motion for a temporary restraining order and ENJOINS defendants from televising the debate between the candidates for lieutenant governor scheduled for November 2, 1990, and the gubernatorial debate scheduled for November 4, 1990, unless they include the ballot-qualified Libertarian candidates as participants.

IT IS SO ORDERED, this 18th day of October, 1990.

_____

Marvin H. Shoob, Judge United States District Court, Northern District of Georgia

1 On October 12, 1990, the Court also issued a written order on Williams' motion to intervene.

2 Plaintiff served all defendants by depositing the amended complaint in the U.S. Mail on October 17, 1990.

3 Section 315 provides in pertinent part:

> (a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station.

4 In fact, plaintiff and intervenor previously were offered equal air-time yet contend that it is worthless compared to the exposure provided by the televised debates. See Transcript at 6.

5 While GPTC relies on Searcy to support its assertion that the content based restriction is reasonable in light of the purpose of the forum, it fails to address other portions of Searcy which clearly state that the government may not manufacture a basis for its restriction in an effort to conceal its attempt to distinguish between particular speakers based on their views. 888 F.2d 1324.

6 GPTC insists that it made a decision on the newsworthiness of the debates at issue in accordance with the statutory purposes of the forum. GPTC

is "created, designed, and intended for the purpose of providing educational, instructional, and public broadcasting services to the citizens of the state of Georgia." O.C.G.A. section 20-13-5(a)(Supp. 1990). The broadcasting services provided by GPTC have traditionally presented educational and instruction programming of the type that is often neither newsworthy nor popular. However, GPTC presents its argument as if its primary objective is to offer programming, similar to that offered by commercial broadcasters, that is preferred by the majority of the public. The court finds that GPTC's position conflicts with the actualities of its operations. Additionally, GPTC has not merely decided to "cover" newsworthy events, it has actually created the debates at issue.

7 Defendants and AJ&C in its amicus curiae brief argue that GPTC's airing of the debates merely amounts to coverage of a new event which is of interest to the citizens of Georgia. Regardless of how GPTC's participation is described, it remains an agency of the state which through its officers and directors has decided to prohibit ballot-qualified candidates from taking part in political debates that will be presented to the public by GPTV. AJ&C's participation does not make the decision regarding the gubernatorial debate any less of a content-based restraint on speech.

8 Chandler and Rand marshalled considerable support to become "ballot-qualified." They submitted a nomination petition "signed by a number of voters equal to 1 percent of the total number

of registered voters eligible to vote in the last election for the filling of the office the candidate is seeking. O.C.G.A¶ 21-2-170(a)(Supp. 1990). Chandler and Rand also paid a substantial qualifying fee.

9 GPTC's failure to consider such a minor change or alternative format supports the finding that the restriction is unreasonable and bolsters the Court's conclusion that the exclusion is viewpoint based. See Searcy, 888 F.2d at 1321-22.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-8968

D.C. Docket No. 1:90-cv-2040-MHS

WALKER CHANDLER,
Plaintiff-Appellee,

CAROLE ANN RAND,
Intervenor-Plaintiff,
Appellee,

versus

GEORGIA PUBLIC TELECOMMUNICATIONS COMMISSION, et al.,
Defendants-Appellants,

ATLANTA JOURNAL AND ATLANTA CONSTITUTION,
Intervenors-Defendants,
Appellants.

On Appeal from the United States
District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Opinion October 31, 1990, 11th Cir., 19__, ___ F.2d ____).

Before CLARK, Circuit Judge, HILL and COFFIN, Senior Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (RUle 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-8968

D.C. Docket No. 1:90-cv-2040-MHS

WALKER CHANDLER,
Plaintiff-Appellee,

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Intervenor-Plaintiff,
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GEORGIA PUBLIC TELECOMMUNICATIONS COMMISSION, et al.,
Defendants-Appellants,

ATLANTA JOURNAL AND ATLANTA CONSTITUTION,
Intervenors-Defendants,
Appellants.

Appeals from the United States District Court
for the Northern District of Georgia

Before CLARK, Circuit Judge, HILL and COFFIN, Senior Circuit Judges.

JUDGMENT

These causes came to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the District Court in these causes be and the same is hereby VACATED; and that these causes be and the same are hereby REMANDED to said District Court with instructions to dismiss the complaint, in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that appellees pay to appellants, the costs on appeal to be taxed by the Clerk of this Court.

Entered: October 31, 1990
For the Court: Miguel J. Cortez, Clerk

ISSUED AS MANDATE: MAR 11, 1991